IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 24, 2009 SESSION

DAVID LEE WRIGHT, As Parent and Next Friend for KAITLYN LEE WRIGHT, A Minor v. ANITA J. WRIGHT, ET AL

AND

KAITLYN LEE WRIGHT, A Minor, By Her Guardian Ad Litem, JAMES P. ROMER v. JOHNNY V. DUNAWAY

Direct Appeal from the Circuit Court for Fentress County
No. 8136 John McAfee, Judge

No. M2008-01181-COA-R3-CV - Filed October 8, 2009

This is the second appeal in this case regarding the amount of attorney's fees awarded to counsel for a minor. The minor was injured in a car accident, and her father employed counsel to file suit on her behalf, naming him as her next friend. The trial court appointed a guardian ad litem for the minor. The parties settled the case, and the trial court approved an attorney's fee award for the minor's attorney of one-third of the settlement proceeds based upon a contingency fee agreement signed by the minor's father. The guardian ad litem appealed, challenging the reasonableness of the fee. On appeal, this Court found no evidence in the record regarding the reasonableness of the award, as the parties did not present proof at the hearing, and the trial court made no findings regarding the relevant factors when approving the award. Therefore, the Court reversed the trial court and remanded for a hearing to enable the trial court to set a reasonable fee. On remand, the trial court heard testimony and considered exhibits submitted by the parties, then slightly reduced the attorney's fee. The guardian ad litem appeals, again challenging the reasonableness of the fee. We affirm, finding no abuse of the trial court's discretion.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

James P. Romer, Jamestown, TN, for Appellant

Johnny V. Dunaway, LaFollette, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On May 12, 2005, Kaitlyn Lee Wright, a nine-year-old girl, was seriously injured in a head-on automobile accident, in which her grandmother, who was driving, was killed. Kaitlyn's father, David Wright, employed attorney Johnny Dunaway to file a complaint for Kaitlyn, naming Mr. Wright as Kaitlyn's parent and next friend. The complaint was filed on June 10, 2005, naming the grandmother's estate and the other driver as defendants. The complaint originally sought $250,000 in damages, but it was later amended to seek $500,000 in damages.

In July of 2006, the case was settled during a Rule 31 judicial settlement conference, with the grandmother's estate paying $425,000 to settle Kaitlyn's claims and the other driver being dismissed. The trial court approved a $141,666 attorney's fee for Attorney Dunaway based on a one-third contingency fee agreement executed by Kaitlyn's father.

Earlier in the proceedings, a guardian ad litem had been appointed to represent Kaitlyn's interests because of disputes between her divorced parents. The guardian, James Romer, filed an appeal to this Court challenging the reasonableness of Attorney Dunaway's fee. In ***Wright v. Wright***, No. M2007-00378-COA-R3-CV, 2007 WL 4340871 (Tenn. Ct. App. Dec. 12, 2007) ("***Wright I***"), the Middle Section of this Court reversed the trial court and remanded for a hearing regarding the reasonableness of the attorney's fee. The Court noted at the outset that, in Tennessee, a next friend (including a parent) cannot make a contract with counsel which would bind the minor with respect to the amount of attorney's fees. ***Id.*** at *4 (citing *City of Nashville v. Williams*, 82 S.W.2d 541 (Tenn. 1935); *Roberts v. Vaughn*, 219 S.W. 1034, 1035 (Tenn. 1920)). The Court explained,

> Where an attorney confers a benefit upon a minor child he is entitled to the reasonable value of his services from the amount recovered; however, it is left to the court to determine what that value is under the circumstances presented. Accordingly, regardless of the fact that [the minor's parents] agreed that [the attorney] would receive thirty-three and one-third of the total recovery in this case, he is only entitled to that fee which the Trial Court determines to be reasonable.

Id. (quoting *Shoughrue v. St. Mary's Med. Ctr.*, 152 S.W.3d 577, 585 (Tenn. Ct. App. 2004)). The Court stated that the factors to be considered in setting attorney's fees are those contained in Rule of Professional Conduct 1.5(a), and the contingent nature of a fee agreement is only one factor to consider. ***Id.*** In addition, the one seeking attorney's fees has the burden of proving what constitutes a reasonable fee. ***Id.*** Although the trial court had held a hearing regarding the guardian ad litem's challenge to Attorney Dunaway's fee, no proof was presented. ***Id.*** at *6. Attorney Dunaway did not testify, nor did he present a copy of the contingency fee agreement or offer an affidavit detailing his work on the case. The trial court heard arguments from the attorneys and simply approved the one-

third fee without making any findings regarding the relevant factors. Therefore, the Court remanded for an evidentiary hearing to determine a reasonable fee to be awarded. ***Id.*** at *7.

On remand, Attorney Dunaway was deposed, he submitted an affidavit detailing his hours, and he testified at the evidentiary hearing. At the conclusion of the hearing, the trial court discussed at length the factors listed in Rule of Professional Conduct 1.5(a) and concluded that Attorney Dunaway should be awarded $131,000 as a reasonable attorney's fee. The court also awarded the guardian ad litem a $10,000 attorney's fee to compensate him for his work on the appeal in ***Wright I*** and on remand. The guardian ad litem timely filed a notice of appeal and again challenges the reasonableness of the fee awarded to Attorney Dunaway.

II. ISSUE PRESENTED

On appeal, the guardian ad litem contends that the trial judge abused his discretion when he "persisted in awarding a plaintiff's attorney's fee of $131,000.00 on a total settlement recovery of $425,000, based mainly on a one-third contingent fee contract." The guardian ad litem also asks this Court to remand the case for the trial court to set his fees for handling this appeal. For the following reasons, we affirm the decision of the circuit court and remand for further proceedings.

III. STANDARD OF REVIEW

There is no fixed mathematical rule in this jurisdiction for determining a reasonable attorney's fee. ***Killingsworth v. Ted Russell Ford, Inc.***, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002). A determination of reasonable attorney's fees is "necessarily a discretionary inquiry," and an appellate court will defer to a trial court's award of attorney's fees unless there is a showing of an abuse of the trial court's discretion. ***Id.*** (citing *United Med. Corp. of Tenn. v. Hohenwald Bank & Trust Co.*, 703 S.W.2d 133, 137 (Tenn. 1986); *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998); *Threadgill v. Threadgill*, 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987)). "Under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to propriety of the decision made.'" ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). "The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court." ***Williams v. Baptist Mem'l Hosp.***, 193 S.W.3d 545, 551 (Tenn. 2006). In reviewing the award, we give deference to the trial judge, who is familiar with the customary fees awarded in similar cases in the county where the court is located. ***Taylor v. Harris***, No. M2008-01579-COA-R3-CV, 2009 WL 2971047, at *3 (Tenn. Ct. App. Sept. 9, 2009). "These are matters customarily left to the discretion of the trial judge because the judge, of course, is familiar with the facts of the case and the manner in which it was litigated." ***Id.*** However, we will find that the trial judge abused his discretion if he applied an incorrect legal standard or reached a decision against logic or reasoning that caused an injustice to the party complaining. ***Williams***, 193 S.W.3d at 551.

IV. DISCUSSION

A. Attorney Dunaway's Fee

The factors to be considered in setting attorney's fees are those contained in Rule of Professional Conduct 1.5(a):

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) Whether the fee is fixed or contingent;
> (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) Whether the fee agreement is in writing.

In approving a $131,000 fee for Attorney Dunaway, the trial judge provided a detailed discussion of each factor. Nevertheless, the guardian ad litem claims that the trial judge "basically rubber stamped the contingent fee agreement" by reducing the initial award by only $10,666. The guardian ad litem also claims that the "predominant factor" in setting a reasonable fee should have been "the number of hours spent times a reasonable hourly rate." We disagree. The Tennessee Supreme Court specifically rejected the "lodestar approach" to setting attorney's fees in ***United Medical Corp. of Tennessee, Inc. v. Hohenwald Bank and Trust Co.***, 703 S.W.2d 133, 137 (Tenn. 1986). "The 'lodestar' approach places primary emphasis on the hours of effort reasonably expended by the attorney and the rate customarily charged[.]" ***Id.*** In Tennessee, "[t]he determination of what constitutes a reasonable fee is [] a subjective judgment based on evidence and the experience of the trier of facts," to be made after considering the factors set forth above. ***Id.*** "The amount of time expended, and the hourly rate commonly charged by attorneys for doing similar work in the community, while important, are not the only, or even the controlling, factors to be considered." ***Id.*** at 136.

Having reviewed all of the applicable factors, and keeping in mind our standard of review on appeal, we find that the trial judge did not abuse his discretion in determining a reasonable attorney's fee. One factor to consider is Attorney Dunaway's experience, reputation, and ability. Attorney Dunaway testified that he had been practicing law for 34 years, and that he routinely practices in 16 counties. He tries more jury cases than any other attorney within the five-county district. The trial judge stated that Attorney Dunaway "has great experience, a great reputation, []

great ability as a lawyer, [and is] well thought of and well respected, especially here in the Fentress County area."

Courts are also instructed to consider the nature and length of the attorney's relationship with the client, and whether the fee agreement was in writing. Kaitlyn's father had retained the services of Attorney Dunaway on numerous occasions over the past ten years, and the trial judge found that he was "a professional and an educated person, [who] obviously knew what he was doing when he contracted with Mr. Dunaway to represent his daughter." Kaitlyn's father signed the written contingent fee agreement at his first consultation with Attorney Dunaway regarding Kaitlyn's case.

We must also consider the fee customarily charged in the locality for similar legal services, and prior advertisements or statements by the lawyer regarding the fees he or she charges. Attorney Dunaway, whose office is in Campbell County, testified that he regularly enters into one-third contingency fee agreements in personal injury cases, but that his hourly rate on other cases is $400. The parties stipulated that in Fentress County, where the suit was filed, attorneys typically enter into one-third contingency fee agreements in personal injury cases, but in other cases, they bill at the rate of $150 to $200 per hour. There was no testimony regarding the fee customarily charged in personal injury cases involving minor clients.

Another factor is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." According to Attorney Dunaway, he spent 139.4 hours working in connection with Kaitlyn's case over a period of one and a half years. The guardian ad litem challenges approximately twenty of the hours Attorney Dunaway attributes to work on Kaitlyn's behalf and claims that the work was actually for the benefit of Kaitlyn's father. Despite the fact that Kaitlyn's father had filed this case as Kaitlyn's parent and next friend, Kaitlyn's mother, Tracy Nivens, filed a separate, similar action on behalf of Kaitlyn and sought to consolidate the two cases. The guardian ad litem did not dispute the hours Attorney Dunaway worked in opposing the consolidation of the two cases. However, Kaitlyn's mother also filed a juvenile court petition in another county seeking exclusive custody of Kaitlyn, which, according to Attorney Dunaway, was "a thinly disguised effort by [the mother] to position herself to control the personal injury litigation." Attorney Dunaway filed a response and motion to dismiss Kaitlyn's mother's juvenile court custody case, which was granted. His affidavit listed 11.2 hours due to work on the custody matter, but the trial court would not consider that time in assessing the reasonableness of the fee in this case, finding that Attorney Dunaway's work in the custody case involved a separate matter between Kaitlyn's father and mother. We find no error in the trial court's decision to exclude these hours from consideration.

The other dispute involves Attorney Dunaway's work in the probate case involving the grandmother's estate. Attorney Dunaway filed motions in that case opposing a proposed private sale of the estate's assets and seeking to have the sales supervised by the court. He included 9.9 hours of work on that case in his affidavit, and the trial court considered the work as necessary to prevent dissipation of the estate and preserve the funds from which Kaitlyn's potential judgment would be satisfied. Again, we find no error in the trial court's decision. "The amount of an award as an

attorney's fee is to be determined upon a consideration of all the facts and circumstances presented by the record, . . . [including] the character and extent of the services which they have performed, not only in the technical litigation itself, but also in matters arising out of and incidental to such litigation." ***United Medical Corp.***, 703 S.W.2d at 136. In sum, we agree with the trial court's finding that Attorney Dunaway spent a total of 128.2 hours working on Kaitlyn's behalf. Attorney Dunaway testified that this work included filing the complaint, gathering, reviewing, and preparing summaries of Kaitlyn's extensive medical records, drafting and serving initial discovery requests, responding to the defendants' discovery, examining the parties' insurance coverage for sources of possible recovery, researching property records to determine the extent and location of the estate's assets, having his associate attend three depositions on his behalf, reviewing and summarizing those depositions, negotiating with the insurer regarding its subrogation interest, and attending mediation. He introduced as exhibits various summaries he had prepared of the medical records, medical expenses, and property records, in anticipation of trial. The trial judge found that Attorney Dunaway acted reasonably and performed all legal services in a proper manner.

Attorney Dunaway testified that the case presented difficult issues due to the lack of a witness, in that Kaitlyn was rendered unconscious in the accident and the grandmother passed away, and also because of the involvement of Kaitlyn's mother and her attorneys. He also described the sizeable amount of medical records that required review.[1] In addition, he testified that there was only $50,000 in insurance coverage available to satisfy any recovery, and he had to determine what assets were available from the grandmother's estate. The trial judge found that Attorney Dunaway was able to locate sufficient assets to satisfy the recovery "because of [his] experience in these areas, because of his exclusive practice, [and] because of his years of practice." The judge found that Attorney Dunaway spent "a substantial amount of hours" on the case, but also noted that an experienced attorney can sometimes achieve results faster than other attorneys.

We should also consider the "amount involved and the results obtained." Attorney Dunaway described the uncertainty he faced if the case proceeded to a jury trial, explaining that a jury might not like the fact of a child suing her grandmother's estate and could award a minimal recovery. The trial judge also stated, "I don't know if a Fentress County jury would have given that kind of money in that type of lawsuit." The judge said that Attorney Dunaway obtained a "good settlement," stating, "this was some good lawyering here to get this kind of money for this child." We also note that the initial complaint sought $250,000 in damages, the amended complaint sought $500,000, and the settlement was $425,000. Kaitlyn's medical expenses totaled over $180,000, but Attorney Dunaway negotiated a settlement of the insurance company's subrogation interest for only $62,517, resulting in a benefit to her of about $118,000. The trial judge noted that Attorney Dunaway's negotiation "sav[ed] the child a substantial amount of money."

Regarding the remaining factors, there were no time limitations imposed by the client or the circumstances, and although Attorney Dunaway testified that his acceptance of employment in this

[1] Kaitlyn suffered a fractured femur, a fractured ankle, and a perforated colon, and she required a cervical fusion and multiple other surgeries.

case took time away from other cases, it was no more than would be expected by any other case. Finally, we must consider the fact that the fee was contingent. "An attorney's fee should be greater where it is contingent than where it is fixed." ***United Medical Corp. of Tennessee, Inc. v. Hohenwald Bank and Trust Co.***, 703 S.W.2d 133, 136 (Tenn. 1986). Attorney Dunaway testified that Kaitlyn's father could not have afforded to proceed with the case if he was charged the hourly rate, and that he could not have personally funded the expenses necessary to proceed with litigation, which Attorney Dunaway also advanced. Attorney Dunaway testified that if Kaitlyn obtained no recovery, he would not have recovered a fee.

Based upon our review of the record, we cannot say that the trial judge abused his discretion in awarding an attorney's fee of $131,000 after its thorough analysis of the applicable factors. Reasonable minds could disagree as to the propriety of the award, and we will not substitute our judgment for that of the trial court simply because we might have reached a different decision.

B. The Guardian Ad Litem's fee

Tennessee Rule of Civil Procedure 17.03 provides:

> Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend. The Court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.

In short, Rule 17.03 "vests in trial courts the discretionary authority to appoint a guardian ad litem for infants or incompetent persons 'whenever justice requires' and to allocate the fees for the guardian ad litem's services to the parties." ***Larson v. Halliburton***, No. M2003-02103-COA-R3-CV, 2005 WL 2493478, at *6 (Tenn. Ct. App. Oct. 7, 2005). The trial court is in the best position to determine whether the guardian ad litem's services were of assistance to the court. ***Keisling v. Keisling***, 196 S.W.3d 703, 731 (Tenn. Ct. App. 2005). Therefore, we remand to the trial court for consideration of the guardian ad litem's request for attorney's fees.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the circuit court and remand for further proceedings. Costs of this appeal are taxed to the appellant, Kaitlyn Wright, and her surety,[2] for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.

[2] We note that the notice of appeal in this case states that "Kaitlyn Wright, plaintiff above-named, by her guardian ad litem, Attorney James P. Romer, hereby appeals to the Tennessee Court of Appeals . . . ." The appeal bond lists as the principal "Tracy Nivens for Kaitlyn Wright," and it provides that Ms. Nivens (Kaitlyn's mother) binds herself for the costs of this appeal with the guardian ad litem serving as surety.